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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1049

GEORGE GABLE, doing business as BOOK SALES CO.,
Appellant,

versus

HERBERT T. JENKINS, Chief of
Police of the City of Atlanta,
Appellee.

MOTION TO DISMISS
THE APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA FROM THE FINAL ORDER OF THE COURT IN CIVIL ACTION NO. 13001.

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Appellee moves to dismiss the appeal filed by Appellants from the final Order of the United States District Court for the Northern District of Georgia on the grounds that this Court lacks jurisdiction pursuant to 28 U.S.C. §1253 as asserted by Appellant. Jurisdictional Statement of Appellant, p.2.

STATEMENT

In the case at bar, Appellant applied for both temporary and permanent injunctive relief (section "(d)" of prayer for relief in Appellant's original "Complaint") as well as for declaratory judgment as to the constitutionality of Ga. Code Annotated 26-2101. Appellant took no practical steps in securing the "temporary" or preliminary relief for which he prayed and allowed the case to proceed to hearing by the three-judge district court on the merits. The three-judge district court held they had jurisdiction in the case and entered an order holding Georgia Code Annotated 26-2101 to be constitutional and denied Appellant's "requested injunctive relief." No ruling was ever entered on and no consideration was given to Appellant's request for a *preliminary* injunction. Appellant contends that "jurisdiction of this appeal has been conferred upon this Court under and by virtue of 28 U.S.C.A. #1253". Jurisdictional Statement, p.2.

THIS COURT LACKS JURISDICTION TO HEAR THIS APPEAL PURSUANT TO 28 U.S.C. §1253

Appellee asserts that this Court does not have jurisdiction to hear this appeal pursuant to 28 U.S.C. §1253. Appellant urges that the recent decision of this Court in *Anghel Goldstein a/k/a Andrei Pietraru et al. v. Joseph A. Cox et al,* 38 LW 4125 (January 26, 1970) (hereinafter "Cox") is dispositive of the jurisdictional issue involved herein.

In *Cox* this Court asserted, with specific reference to 28 U.S.C. §1253, that:

> ... the only interlocutory orders which we have power to review under that provision [§1253] are orders granting or denying *preliminary* injunctions. Since in our view the District Court here decided no question of preliminary injunctive relief, we cannot review its order. (Emphasis supplied by the Court)

This Court proceeded to analyze Section 1253 and to discuss its history and legislative intent. While this Court noted that the Section read literally might compel the conclusion that interlocutory orders denying preliminary as well as permanent injunctions can be appealed to the Court, it was quick to point out that such a construction would involve an expansion of the Court's mandatory appellate jurisdiction over that granted by the clear language of the prior statute. This Court stated that no such expansion was intended by Congress in light of the traditionally, narrowly construed jurisdiction under the Three-Judge Court Act and the undesirable practice of piecemeal appellate review. Citing *Switzerland Assn. v. Horne's Market*, 385 U.S. 23 (1966); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949); *Phillips v. United States*, 312 U.S. 246 (1941); *Moore v. Fidelity & Deposit Co.*, 272 U.S. 317 (1926); *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251 (1916). This Court then asserted:

> In light of these factors, and the history of the statute as set out above, we cannot but con-

clude that our jurisdiction over interlocutory orders under §1253 is confined to orders granting or denying a *preliminary* injunction. (Emphasis supplied)

CONCLUSION

Appellee, therefore, respectfully requests this Court to dismiss the appeal from the Order of the District Court for the Northern District of Georgia.

HENRY L. BOWDEN

JOHN E. DOUGHERTY
Counsel for Appellee

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon Counsel for Appellants, Wesley R. Asinof, Esq., a copy of the Motion to Dismiss in the above-styled case by placing the same in an envelope with sufficient postage and proper address and mailing same to Counsel for Appellants by Registered United States Mail.

HENRY L. BOWDEN